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No. 07-988

IN THE

Supreme Court of the United States

RAFAEL DIAZ-RAMOS, PETITIONER

v.

HYUNDAI MOTOR COMPANY AND HYUNDAI AMERICAN TECHNICAL CENTER, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Puerto Rico statute entitles the consumer to file a private *individual* suit in the Department of Consumer Affairs against any unfair trade practice. However, because the powers of this governmental agency are limited, the Consumer Class Action Act (CCAA) grants to the consumer the "right" to file *directly* in "Court" a "class" action "based" on the antitrust section 259, which forbids all unfair trade practices. The CCAA creates "additional" remedies by imposing "equal" class-wide damages plus mandatory prejudgment interests, costs and "not less than 25%" for counsel fees (aside from availing an injunctive relief). A legal "Trust Fund" is used to distribute the class recovery, the unclaimed share of which benefits all consumers. Yet, the appellate court relied upon Fed.R.Civ.P. 23 decisions while holding that the CCAA is merely "procedural" and that it cannot thus create a "right" to recover or sustain a "cause of action." And so, the court decided that because Petitioner cannot pursue his unfair-practice claim *individually* in "Court," he thus cannot recover as part of a "class."

The questions presented are:

1) Whether it is "substantive" — for purposes of *Erie*, *Hanna* and progeny — a state rule that requires several persons to unite as a class in order to enforce their *common* interest in the collection of a state-created *single* liability.

2) Whether the federal-court nullification of Puerto Rico's Consumer Class Action for Unfair Trade Practices compels a reversal in light of established precedents.

In the alternative, whether the Puerto Rico

Supreme Court's intervening and conflicting precedent in *Guzmán v. Vaquería*, 2006 TSPR 187, compels a GVR order for further consideration pursuant to 28 U.S.C. § 2106.

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JURISDICTION

The Court of appeals' judgment was entered on August 30, 2007. A timely petition for rehearing was denied on September 24, 2007. Due to a timely filed application, this Court extended the time to file the petition for writ of certiorari to and including January 22, 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The relevant provisions of Puerto Rico Laws Annotated are reproduced at App. 29a-32a.

STATEMENT

This case raises important, recurrent questions relating to the elusive distinction between "substantive" and "procedural," as well as to the proper scope of Rule 23 of Federal Rules of Civil Procedure in diversity actions.

A. Puerto Rico's Consumer Class Action for Unfair Trade Practices.

The petitioner Rafael Diaz brought this diversity action on behalf of himself and a proposed class of about

35,000 consumers in Puerto Rico, for all of them own a model-year 1995, 1996 or 1997 Hyundai Accent car that was *unlawfully excluded* from two (2) manufacturer-initiated "recalls." (J.A. 1-10). [1]

As damages and injunctive relief, Diaz claimed an amount equal to the class-wide costs of publishing and securing in Puerto Rico the reasonably necessary *safety precautions* that respondent Hyundai Motor Company of Korea must take affirmatively in order to retrofit these cars, and thus prevent or repair their corrosion-related "suspension" problems. (J.A. 12-15, 22-26). The alleged damages were estimated to be between "$500.00" and "$1,000.00 per vehicle repair." (J.A. 70).

Both recalls merely met the "policy" guidelines of the National Highway Traffic Safety Administration (NHTSA) that state that any automaker initiating a corrosion-related "regional recall" should include at a "minimum" the 20 salt-belt states, and the District of Columbia, where salt is used to deice the roads during winter. However, because NHTSA has never codified this "policy" in "binding regulations," the District of Columbia Appellate Court held that such "policy" has neither "legal force" nor "binding effect," nor can it establish "new rights and obligations" and thus does "not change an automaker's legal obligations." *Center for Auto Safety, Inc. v. NHTSA*, 452 F.3d 798, 808-811 (2006). In other words, this "non-binding policy" cannot provide a "norm or safe harbor" for automakers to

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[1]The abbreviated references are used for: Appendix of this petition (App.); petitioner's Main Brief in court of appeals (M.B.) and Main Brief Appendix (M.B.App.); Certified Translations in court of appeals (C.T.); petitioner's Reply Brief in court of appeals (R.B.) and Reply Brief Appendix (R.B.App.); and the Joint Appendix in court of appeals containing the complaint (J.A.).

shape their actions. *Id.* (R.B. 21-35).

And so, Diaz contended that the respondent automaker must abide by the law in Puerto Rico — where the marine-salt environment may also trigger the two (2) *hidden* corrosion-induced safety hazards, that Hyundai sought to monitor and prevent or repair by voluntarily conducting its two "regional recalls." (J.A. 10) (M.B. 4-15).

Diaz grounded his claim for relief on the Consumer Class Action Act (CCAA) of Puerto Rico, sections 3341 and 3342 of Title 32, which grants to the consumer the "right" to file a "class" suit in "Court" for "damages" as well as "injunction," and "based on the Antitrust Act of the Commonwealth, §§ 257-274 of Title 10." (App. 29a). Accordingly, Diaz premised his cause of action on the section 259 of Title 10 that forbids all "unfair or deceptive acts or practices in trade or commerce." (App. 30a) (J.A. 22).

Additionally, Diaz invoked the CCAA remedy provision 3343, the letter of which states that the court not only can "prevent, avoid, deter and punish any action to the prejudice of the consumers," but also "shall impose:"

> [1] an amount *equal* to the damages determined as compensation for damages,
>
> [2] plus a reasonable amount not less than 25% for attorney's fees,
>
> [3] plus legal interest from the moment the damages is caused
>
> [4] and costs of the proceedings.

(App. 29a-30a) (J.A. 24) (emphasis added). For the distribution of this class recovery, the Puerto Rico law commands to set up a "Trust Fund to be used according

to an order issued by the sentencing court." Title 23, § 1017 (App. 32a). After one year, any unclaimed amount must be deposited in another "Trust Fund" to be used by either the Department of Consumer Affairs or the Department of Justice "in initiating future actions for the protection of the consumers." *Id.*, and 1016(b) (App. 31a) (J.A. 24-26).

B. The "Special Cause of Action" created by the Consumer Class Action Act of Puerto Rico.

The legislative history explains that the CCAA affords a "*special cause of action* based upon the urgent interest of the Commonwealth of Puerto Rico in protecting consumers." CCAA's Statement of Motives for Amendment of 2002. (M.B.App. 16-17) (emphasis added). That is because the CCAA was enacted to protect consumers against the "*deceitful*, *improper*, *false* or *fraudulent* practices" in trade or commerce. (App. 4a-5a) (emphasis added).

Recently, in *Guzmán v. Vaquería*, the Supreme Court of Puerto Rico construed that the CCAA was intended to solve the "limitation of the legal tools available" to consumers. 2006 TSPR 187 (App. 23a). The premise of this conclusion is found in the "legislator's concern" stressing that:

> Unfortunately the remedies available to consumers to enforce their rights are still inadequate and the protection offered the consumer by the Consumer Service Administration [now Department of Consumer Affairs] . . . is not sufficient . . . For this reason, a suit filed directly by the consumer is warranted

in such cases.

Guzmán, id., quoting the CCAA's Statement of Motives of 1971 (App. 23a). Thus, because the "remedies" and "protection" provided by such governmental agency are "inadequate" and "not sufficient," the drafters created the Consumer Class Action Act (CCAA).

On one hand, the CCAA section 3341 entitles the "Commonwealth of Puerto Rico, through their agencies, dependencies and instrumentalities in their capacity of parens patriae" to file a "class" suit on behalf of consumers. (App. 29a). Accordingly, the Puerto Rico Supreme Court held that this provision specifically entitles the Secretary of the Department of Consumer Affairs (formerly called Director of the Consumers Service Administration) to file a "class" action on behalf of either the consumers in "general," or certain "groups" of consumers, or on behalf of any consumer in "particular." *Hernández Denton in his capacity as Director of ASERCO, in representation and in behalf of Eugenio Cámara Rodríguez, Wallace A. Seda, Victor M. D'Cristina et al., v. Western Pines Corp.*, 1975 WL 38794, 3 P.R. Offic. Trans. 1028. In other words, the CCAA allows the Secretary of this governmental agency to file a "class" suit not just to protect the public interest, but to further protect the *private* interest of any consumer in "particular." *Id.*

On the other hand, the CCAA likewise vests upon any injured consumer the same representative "capacity." *Id.* That is because the CCAA "authorize[s] the consumers to go *directly* to Court to vindicate their rights *without* having to be *assisted by a governmental agency*." *Guzmán, supra* (App. 24a) (emphasis added). Put differently, the CCAA allows the consumer to

"avoid the obstacles that are occasionally presented by the bureaucracy of the *agencies* that are called upon to defend them." *Id.* (App. 25a-26a) (emphasis added). Briefly, the CCAA's "objective is to eliminate all legal obstacles that might make it difficult for the consumers to go to Court." *Id.* (App. 24a). Thus, the CCAA constitutes the "Legislature's mandate to pave the way to court for consumers." *Guzmán* (App. 26a).[2]

In addition, the Supreme Court of Puerto Rico construed that by drafting the CCAA the legislator "recognized the inherent difficulty of claiming small sums against the big businesses." *Id.* (App. 23a). As basis, the *Guzmán* Court quoted this entire passage of the CCAA's "Statement of Motives:"

> Usually claims of the consumers involve such small amounts of money that they do not justify an *individual* suit; it is more economical and fair that claims essentially identical be filed in a single class suit on behalf of all consumers who have been *cheated* and *deceived*... This type of action compensates the inability of the individual consumer to litigate small individual losses by permitting that *one* or more representatives of a group of consumers with similar damages may bring a suit on behalf of a class...The latter are forced to consider not only the direct economic loss of the class suit but also the publicity and public reaction with the entailing loss of time, name or prestige. In the interest of discouraging

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[2]The *Guzmán* construction of the CCAA serves to define also the *individual* injunction that the antitrust section 269 authorizes the Secretary of Justice to file in "Court" against any unfair trade practice.

> the *improper* and *deceitful conduct* of the suppliers of goods and services to consumers, the Legislature of Puerto Rico considers it of imperative necessity to establish the consumer class suit.

Guzmán, id. (App. 23a-24a) (emphasis added). That is why the CCAA "recognizes the right to the consumers to file an action under the Antitrust Act of the Commonwealth of Puerto Rico, 10 LPRA § 257 et. seq.," *id.* (App. 25a) — which includes the antitrust section 259(a). The CCAA "constitutes, therefore, a mandate for the courts to open our doors to the consumers injured by the *unlawful* practices of the providers of goods and services." *Guzmán, id.* (App. 26a).

And so, the Puerto Rico Supreme Court's construction of the CCAA illustrates why the legislator deemed as "inadequate" and "not sufficient" the private *individual* actions that section 1005(g) of Title 23 entitle the consumers to file in the Department of Consumer Affairs against "*any* unfair or deceitful act or practice" (App.31a) -- that is, against the "unfair or deceptive acts or practices" that section 259(a) expressly declared "*unlawful.*" (App.30a) (emphasis added). For even though the Department of Consumer Affairs (formerly known as the Consumer Service Administration) must watch over the consumers' private interests and "basic rights" — including their "protection from dangerous products and against unscrupulous practices" — when it was originally created in 1968 this governmental agency was authorized to merely issue "corrective orders" to repair defects or reimburse the costs of repair. *Hernandez Denton v. Quiñones Desdier*, 1974 WL 36883, 2 P.R.

Offic. Trans. 274.[3]

Thus in order to solve such "limitation of the legal tools available" at the Department of Consumer Affairs, the drafters created the CCAA in 1971 to not only "extend[] the remedies available for the consumers" (App.26a), but to also "allow[] the concession of *additional* remedies" (App.25a) — like the mandatory "equal" class-wide damages, prejudgment interests, costs, statutory counsel fees, and the class-wide injunctive relief availed by the CCAA section 3343. (App.29a-30a) *Guzmán*, *supra* (emphasis added). And all these *new* remedies provided by the CCAA were "established therein" only. *Guzmán*, *id.* (App. 27a).

In summary, the CCAA constitutes a "specific tool that grants the consumers a broad and effective instrument to protect their *rights*" against the "*improper* and *deceitful conduct* of the suppliers of goods and services." *Id.* (App. 25a, 24a) (emphasis added). For the CCAA allows the consumer to file a suit *directly* in "Court" without having to go first to the Department of Consumer Affairs.[4]

Indeed, even though "the courts are the only

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[3]The *Quiñones* Court explained that when section 1005(g) was added in 1972 it did "not create" the "powers" of the Consumer Service Administration to "adjudge the complaints" it receives against unfair trade practices. Instead, the addition of section 1005(g) only "eliminated" any "possible doubts or controversies" as to the "powers" of the Administration "regarding those matters" — that is, its purpose was to "reaffirm" such powers. *Id.* Thus, although the CCAA was enacted in 1971, the *Guzmán* construction serves to define the private *individual* action that section 1005(g) alludes to.

[4]Any person adversely affected by a decision of the Department of Consumer Affairs can also file an appeal for review to the Court. P.R. Laws Ann. Title 23 § 1009(b), and Title 3 § 341p.

ones that can certify class suits," many of the consumer class actions have been "wrongly" dismissed "based on not having exhausted all *administrative* remedies." CCAA's Statement of Motives for Amendment of 2002 (emphasis added). (M.B.App.16-17). For this reason, the Puerto Rico Legislature opted to "clarify" that the "Court" has "exclusive primary jurisdiction, this being a *special cause of action.*" *Id.*

C. The district court decided *sua sponte* that a cause of action based on section 259(a) requires 'competitive' injury.

Although no such defense was ever raised, the district court dismissed with prejudice the Consumer Class Action for Unfair Trade Practices on grounds that the petitioner Diaz failed to allege 'competitive' injury. (App. 13a). And being such a question of first impression under Puerto Rico law, the court opted to rely upon the case law of the federal Sherman Act, section 1 and of the parallel Puerto Rico antitrust section 258 — each of which proscribes the unreasonable "restraint" of trade or commerce by means of any contract, combination or conspiracy.

Moreover, the district court plainly "denied" the petitioner's motion for reconsideration which pointed to the legislative history clearly declaring that when section 259(a) was enacted in 1964 it was patterned *not* on the Sherman Act, but, instead, on the Federal Trade Commission Act's section 5. And because the Puerto Rico Legislature *explicitly* adopted also the holding in "*F.T.C. v. R. F. Keppel and Bro., Inc.*, 291 U.S. 304, 312 (1934)," (M.B. 23), Diaz advised that — as resolved in *Keppel* under section 5 of the FTC Act — the parallel section 259(a) was enacted to not only protect

competitors, but to also protect "consumers."

Besides, under Puerto Rico law when a statute is adopted from other jurisdiction it includes the construction given until then by such jurisdiction's courts unless the said interpretation conflicts with the Puerto Rico "legal tradition" or "sense of justice." *P.R. Fuels, Inc. v. Empire Gas Co., Inc.*, 149 D.P.R. 691, 707-708, 714-716 (1999). (C.T. 12-14, 22-25).

Anyway, this Court has already explained that the *Keppel* judicial construction was legislatively adopted in 1938 when Congress amended the FTC Act in order to clarify that its section 5 proscribes not only the "unfair methods of competition," but also the "unfair or deceptive acts or practices." *F.T.C. v. Sperry and Hutchinson Co.*, 405 U.S. 233, 239-240 (1972). [5]

D. The appellate court affirmed on the different ground that the Consumer Class Action Act does not provide a "private right of action" against unfair trade practices.

Rather than resolving the competitive-injury question that the district court raised and decided *sua sponte*, the court of appeals affirmed the dismissal on the following rationale:

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[5] *See* (M.B. 21-23, 32-36, 58-60), citing also *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F. 2d 1289, 1292 (4th Cir. 1987) which held that like the parallel section 5 of the FTC Act, the South Carolina unfair-practice law is equally aimed at those "two distinct kinds of conduct." *Ralston* further held that a practice need not violate the Sherman Act in order to violate the FTC Act. *Id.*, 1293. Cf. *People ex rel. Mosk v. National Research Co.*, 201 Cal. App. 2d 765, 771, 773 (1962) and *Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 110 (1972) holding that, likewise to the similar section 5 of the FTC Act, the California unfair-practice law does not require to show 'competitive' injury.

> The Antitrust Act *expressly* prohibits a private right of action for suits brought under section 259(a), and nothing in the CCAA — a *procedural* class action statute — provides any indication that the Puerto Rico legislature intended to create a *substantive* right of action for class action suits pursuant to section 259(a).

(App. 8a-9a) (emphasis added).

Thus notwithstanding that the Puerto Rico Civil Code ordains that when the "letter" of a statute is clear it cannot be disregarded under the pretext of fulfilling its "spirit" (Title 31, §§ 14, 19), the court still construed that "Diaz reads too much into the CCAA's *explicit* statement that it recognizes a right for consumers to file a class action based on sections *257 through 274* of the Antitrust Act." (App. 6a) (emphasis added).

First, the court pointed to the antitrust section 268, the letter of which — according to the court — "explicitly" precludes *any* private right of action in "Court" against unfair trade practices. (App. 4a). Even when section 268 only states that:

> Any person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, except §§ 259 and 261 of this title, may sue therefor[] in the Court of First Instance *and shall recover threefold the damages by him sustained, plus costs, including a reasonable amount for attorney's fees.*

(App. 30a-31a) (emphasis added). However, by omitting

to mention and not considering the above highlighted language in italics (App. 4a), the court avoided to distinguish between an *individual* action under section 268 for "threefold" damages vis-a-vis a *class* action under the CCAA for "equal" damages — the latter of which is the amount sought by Diaz in his consumer class action complaint. (J.A. 13, 24). And the court did not say either that the legislative history clearly explains that the preclusion to recover "treble" damages against unfair trade practices under section 268, *cannot* affect the "right to file an ordinary action for damages" under "other principles of law." (R.B. 12) (R.B.App. 4).

Second, the court next concluded — but without explaining how it reached so — that the CCAA is merely "procedural." (App. 5a, 6a, 9a). And so, the court applied the "longstanding *precedent*" — based on Rule 23 of Federal Rules of Civil Procedure — stating that a claimant cannot "represent a class" unless he can "sue in his own right" (App. 5a); that "[t]he application of Rule 23 does not abridge, enlarge or modify any *substantive* right," *id.;* as well as establishing that "*procedural* class action provisions neither create substantive rights nor give rise to an independent cause of action." (App. 6a) (emphasis added). Consequently, the court held that because Diaz cannot pursue his unfair-practice claim *individually* in "Court" (App. 4a), he thus cannot recover as part of a "class." (App. 5a). [6]

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[6]The court also cited two decisions based on state class-action rules modeled on Rule 23. Yet, notwithstanding that the drafters codified the CCAA under the still-in-force provisions of the repealed *Code of Civil Procedure* — the history of which is succinctly explained in *Guzmán, supra* (App. 21a-22a, 28a) — the court did not consider that the implications of the CCAA are

Third — even though the court concedes that the CCAA was enacted to protect consumers against the "deceitful, improper, false or fraudulent practices" (App. 4a-5a) — it nonetheless construed that the "CCAA offers no indication that its drafters intended to create a right of action for violations of section 259(a)," which forbids all "unfair or deceptive acts or practices." (App. 6a, 30a). In so concluding, the court pointed to the CCAA's "Statement of Motives" declaring that "[m]any persons acting together as consumers who have been defrauded may enforce their *individual rights* by means of a consumer class suit." (App. 6a-7a) (emphasis added by the court). Thus, the court decided that "this statement indicates that rights must already exist at an individual level in order to support a class action." *Id.* However, the court forgot that the consumer has indeed an *individual right* to file a private suit in the Department of Consumer Affairs against "any unfair or deceitful act or practice." P.R. Laws Ann. Title 23, § 1005(g). (App. 31a). And the court even ignored the consumer's primary *right* of being free from the unfair trade practices plainly declared "unlawful." (App. 30a).[7]

Fourth, the court further justified its decision on grounds that "Diaz's contention that the CCAA

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substantive.

[7]The Civil Code (Title 31, §§ 2991 and 2992) declares that an *obligation* or *duty* is created by "law" or by an "illicit" act or omission, and that such a duty can consist of "not doing" something. The Puerto Rico Supreme Court held that where a statute imposes a "specific duty for the protection and benefit of others" the "neglect to perform such duty creates a liability for any resulting injury." *García Pagán v. Shiley*, 22 P.R. Offic. Trans. 183 (1988). See, e.g., *Kagan v. Gibraltar Sav. & Loan Ass'n*, 35 Cal.3d 582, 593 (1984), holding that because it is "unlawful" to engage in any unfair trade practice, the consumer has the corresponding "legal right not to be subjected thereto." (R.B. 4-6).

effectively serves as an *implied repeal* of section 268 violates established principles of statutory interpretation." (App. 7a-8a) (emphasis added). That is, even when Diaz *never* contended so. In fact, Diaz asserted exactly the opposite of what the court quoted him as saying. For instance, Diaz contended — in his reply brief under the section entitled "The class-wide remedies afforded by the Consumer Class Action Act are *not* in 'irreconcilable conflict' with the individual remedies precluded by the Antitrust Act" — that because the CCAA and the section 268 can be both "harmonized" and are "capable of coexistence," it is the "duty" of the court to "regard each as effective." (R.B. 19-20).

Finally, the appellate court opted not to "certify the issue of whether a private right of action exists to the Puerto Rico Supreme Court" because "the clarity with which the Puerto Rico legislature has spoken on this issue renders certification unnecessary and inappropriate." (App. 8a).

And so, the appellate court opted not to "consider" — although it was pressed by respondent and fully briefed by both parties — whether the NHTSA's regional-recall "non-binding policy" *impliedly* preempts the CCAA's "special cause of action" against unfair trade practices. (App. 8a).

E. The appellate court's construction of the Consumer Class Action Act did *not* consider the Puerto Rico Supreme Court's intervening and conflicting interpretation of this state law.

Nowhere in the *Diaz* decision it is mentioned, much less discussed, the case of *Guzmán v. Vaquería*,

2006 TSPR 187 — whereby the Puerto Rico Supreme Court recently construed the CCAA in *conflict* with the federal court's interpretation.

Even though the *Guzmán* decision was handed down on December 14, 2006 — after both petitioner and respondent had already filed their respective main briefs in the court of appeals — the petitioner Diaz did advise the federal court about the *Guzmán* opinion immediately after it became published. Indeed, Diaz even included a certified translation with his reply brief (filed on January 22, 2007). (R.B.App. 6-16) (App. 21a-28a). Such notification amounts to more than six (6) months in advance to when the appellate court handed down the *Diaz* decision.

So far, apart from the specific point discussed in the *Western* case, *supra*, *Guzmán v. Vaquería* constitutes the *only published* opinion where the Puerto Rico Supreme Court fully explores the CCAA's contours.

REASONS FOR GRANTING PETITION

The federal-court nullification of the Consumer Class Action for Unfair Trade Practices deprives the 4 million consumers in Puerto Rico of a well gained and deserved state-created "right."

Even though a federal court's decision on a question of state law is not binding on state tribunals, with the recent enactment of the Class Action Fairness Act (CAFA) — and its sweeping jurisdictional provisions — the "plainly wrong" holding in this diversity action will indeed set a binding precedent for the great majority of consumer class actions involving the residents of Puerto Rico.

By denying the petitioner's request for

certification, the appellate court also deprived the highest court of Puerto Rico from deciding and settling a matter that involves an extremely important question of local policy.

But those are not the only reasons why this petition should be granted.

I. Because for purposes of *Erie*, *Hanna* and progeny the Consumer Class Action Act (CCAA) is "substantive," the federal court is bound to enforce such Puerto Rico law in this diversity action brought under the CCAA provisions.

A. The CCAA requires the consumers to sue as a "class" in order to enforce their *common* interest in the collection of the CCAA-created *single* liability.

The CCAA grants to consumers an *integrated* "right" to recover their class-wide damages caused by any unfair trade practice. Specifically, the CCAA recognizes the consumers' "right" to file a "class" suit directly in "Court" based on the antitrust sections "257-274," and thus "based" on the section 259(a) that forbids all unfair trade practices. (App. 29a, 30a). As said before, the consumer has also the right to file a private *individual* suit in the Department of Consumer Affairs against such illegal practices. P.R. Laws Ann. Title 23, §1005(g) (App. 31a). However, the remedies provided by this governmental agency are "inadequate" and "not sufficient."*Guzmán v. Vaquería, supra* (App. 23a). Therefore, in order to solve such a "limitation," *id.*, the Puerto Rico Legislature enacted the CCAA and thus provided to consumers the "right" to recover "equal"

class-wide damages plus mandatory prejudgment interests, costs and statutory counsel fees (apart from availing a class-wide injunctive relief). P.R. Laws Ann. Title 32, § 3343 (App. 29a-30a). In other words, the CCAA entitles the consumers to get the "additional remedies" that are "established therein" only. *Guzmán, supra* (App. 25a, 27a).

And so, by recognizing this *integrated* "right" of recovery against unfair trade practices, the CCAA further creates a *new* independent obligation or liability. For instance — under the antitrust section 268 — the supplier of goods and services has *no* obligation to pay "*threefold*" damages to the *individual* consumer injured by the supplier's unfair trade practices. P.R. Laws Ann. Title 10. (App. 30a-31a) (emphasis added). However — under the CCAA section 3343 — the supplier does have the obligation to pay an amount "*equal*" to the class-wide damages caused by such illegal practices. P.R. Laws Ann. Title 32. (APP. 29a-30a) (emphasis added). Likewise, even though the antitrust section 268 does not require the supplier to pay *prejudgment interests*, the CCAA otherwise imposes to the supplier the additional obligation of paying "legal interest from the moment the damage is caused" to the consumer class. *Id.* On the same token, although the supplier must pay a "reasonable amount" for *attorney's fees* under section 268, the CCAA, instead, imposes to the supplier of goods and services a new obligation to pay "not less than 25%" of all the class recovery as counsel fees. *Id.* In sum, the CCAA requires the consumers to unite as a class not just to jointly enforce in "Court" the section 259(a), but to collectively secure the *single* class recovery or common fund upon which all class members share a *common* and *undivided* interest.

One factor that defines a "common and undivided interest" is when the class members' "claims constitute in their totality an *integrated right* against the defendants." *Berman v. Narragansett Racing Assoc.*, 414 F.2d 311 (1st Cir.1969), cert. denied, 396 U.S. 1037, 90 S.Ct. 682, 24 L.Ed.2d 681 (1970) (emphasis added). A second factor is that the defendant has no interest in how the claim is distributed among the class members. *Id.*, at 316. And a third "identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." *Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir.1983). All these factors define the CCAA's 259-based "special cause of action."

First, the consumers injured by the suppliers' unfair trade practices have an *integrated* "right" to recover as a "class." For even though the consumers so injured may file private *individual* suits in the governmental agency, in order to avail themselves of the CCAA's "additional" remedies, the CCAA requires them to unite and sue collaboratively through a "class" action suit. In other words, the CCAA allows the consumers to file a suit directly in "Court" — without having to "exhaust[] all *administrative* remedies — but *only* by means of the class-action mechanism. CCAA's Statement of Motives for Amendment of 2002 (emphasis added). (M.B.App.16-17). Simply put, they cannot obtain the CCAA's extended remedies unless they sue in "Court" as a class. And so, the class members share a *common* title or "integrated right against the defendants." *Berman, supra.*

Second, the suppliers of goods and services that are liable for any damaging unfair trade practice have no interest in how the claim is distributed among the

class members recovering through the CCAA provisions. *Id.* For the distribution of the class recovery takes place by way of a legal "Trust Fund" that is "used according to an order issued by the sentencing court." Title 23, § 1017 (App. 32a).

Finally, because the unclaimed share of the class recovery accrues to the benefit of all class members, the third characteristic of a "common and undivided interest" also defines the CCAA-created Consumer Class Action for Unfair Trade Practices. *See id.*, § 1016(b), ordaining that after one year any unclaimed amount in the "Trust Fund" must be used by either the Department of Consumer Affairs or the Department of Justice "in initiating future actions for the protection of the consumers." (App. 31a).

Thus, the CCAA requires the consumers to sue as a "class" for them to be able to enforce their *common* interest in the collection of the CCAA-created *single* liability (that is, the common recovery fund).

B. The scope of Federal Rule 23 is not "sufficiently broad" to "control" the disputed point of whether the consumers in Puerto Rico are entitle to *collectively* enforce the Unfair Trade Practice law 259(a) and obtain *class* recovery.

The appellate court relied upon "Rule 23" decisions as "precedent" for the proposition that "*procedural* class action provisions neither create *substantive rights* nor give rise to an independent *cause of action.*" (App. 6a) (emphasis added). However, such federal decisional law is not controlling in this diversity action based on Puerto Rico law.

At the outset, the court erred in concluding that

the CCAA is merely "procedural." (App. 9a). For as discussed before, the CCAA creates not only a right of recovery but also a new liability. Indeed, another appellate court recently held that it is "well settled" that the obligation to pay "prejudgment interest" — as imposed by the CCAA — is a "*substantive*" aspect of a plaintiff's claim, and thus is not merely "procedural." *In re the Exxon Valdez*, 484 F.3d 1098, 1101 (9th Cir. 2007) (emphasis added).[8]

Even so, the scope of Fed.R.Civ.P. 23 is not sufficiently broad to control the issue of whether the CCAA entitles, or not, the consumers in Puerto Rico to collectively enforce their common interest in the collection of the CCAA-created single liability. That is, whether the CCAA creates, or not, an integrated "right" to recover or a "cause of action" against unfair trade practices.

On its face, the Rule 23 "merely establishes the procedures for pursuing a class action in the federal courts." *Wade v. Danek Med., Inc.*, 182 F.3d 281, 290 (4th Cir.1999). Specifically, it sets forth the circumstances under which "[o]ne or more members of a class may sue or be sued as representative parties," but makes no reference to the *remedies* that representative parties may seek. *See* Fed.R.Civ.P. 23. In addition, Rule 23, like all Federal Rules, must be interpreted "with sensitivity to important state

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[8]The Puerto Rico Supreme Court — in an unpublished opinion authored by the then Chief Justice José A. Andreu García (who recently joined the petitioner's legal representation to help research and frame the questions hereby presented) — defined that the CCAA is a "unique, cutting-edge legislation" that "created the *substantive* right" to file a direct and private suit through the class action mechanism. *Trilla v. Torres*, CC-2001-661 (emphasis added). (MB. 25). (M.B.App. 20). (R.B. 17). (C.T. 63).

interests and regulatory policies" that may be frustrated by the application of federal procedures. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n. 7, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996).

In contrast to Rule 23, the Consumer Class Action Act (CCAA) is a statement of a "*substantive* decision" by the Commonwealth of Puerto Rico that the consumers' integrated "right" in the recovery of the CCAA-created single liability constitutes an "integral part" of the several "policies" served by the quintessential consumer-protection statute, that is, the Antitrust Act's Unfair Trade Practice law 259(a). *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 751,100 S.Ct. 1978, 1985 (1980) (emphasis added). Indeed, the drafters created the CCAA to protect the consumers against the "deceitful, improper, false or fraudulent practices" by "the suppliers of goods and services." (App. 5a). To that end, the CCAA "grants the consumers a broad and effective instrument to protect their rights." *Guzmán, supra* (App. 25a). Consequently, by availing the collective enforcement of section 259(a) through the Consumer Class Action, the CCAA gives rise to a "special *cause of action* based upon the urgent interest of the Commonwealth of Puerto Rico in protecting consumers." CCAA's Statement of Motives for Amendment of 2002 (emphasis added). (M.B.App.16-17). Additionally, the courts must construe and apply together the CCAA and the section 259(a) in light of the harm that both statutes are meant to remedy. *See* Civil Code, Title 31, §18 (ordaining that the laws that refer to the "same matter" or whose "object is the same" must be read together). Basically, because when the drafters patterned section 259(a) on the FTC Act section 5, they *explicitly* adopted the holding in "*F.T.C. v. R. F. Keppel and Bro., Inc.*, 291 U.S. 304, 312 (1934)."

(M.B. 23). And so, the Unfair Trade Practice law 259(a) was likewise intended to protect "consumers." *Id.*

In light of the text and policies of the provisions, the appellate court erred in relying upon "Rule 23" decisions as "precedent," and thus implying that the scope of this Federal Rule is "sufficiently broad" to "control" the *remedial* issues governed by the CCAA. *See*, e.g., *Walker*, *supra*, at 749-750. The Rule 23 does not replace the mentioned "policy" determinations found in the Puerto Rico law. *Id.*, at 752. Conversely, Rule 23 and the CCAA "may both apply in federal court in a diversity action," for both "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Id.* Indeed, in *Guzmán v. Vaquería*, *supra*, the Puerto Rico Supreme Court applied the CCAA as well as the Puerto Rico Rules of Civil Procedure, Rule 20 — the state-law corollary to the Federal Rule 23. [9]

And so, "there being no Federal Rule which cover[s] the point in dispute, *Erie* command[s] the enforcement of state law." *Walker*, 446 U.S., at 750, citing *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Especially, because not enforcing such state law would result in an inequitable "administration of the law." *Id.*, at 753, citing *Hanna*, at 468. There is simply no reason why, in the absence of a controlling federal rule, an action based on state law that would be allowed in the state courts to proceed through litigation to judgment, should be barred in federal court solely because of the fortuity that there is

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[9]Additionally, since the "Rule 23" decisions (upon which the court relied) are *distinguishable* from the *Guzman* decision that interprets the CCAA, the petitioner will eventually raise this point if necessary.

diversity of citizenship between the litigants. *Id.* "The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it." *Id.*

Thus, because for purposes of *Erie*, *Hanna* and progeny the Consumer Class Action Act (CCAA) is "substantive," the federal court is bound to enforce such Puerto Rico law in this diversity action brought under the CCAA provisions.

II. The federal-court nullification of Puerto Rico's Consumer Class Action for Unfair Trade Practices compels a reversal in light of established precedents.

A federal court is bound by the highest state court's construction and interpretation of a state statute. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Rochester Lincoln-Mercury, Inc. v. Ford Motor Co.*, 248 F.3d 46 (1st Cir. 2001). Federal courts lack jurisdiction to place a construction on a state statute different from the one rendered by the state's highest court, whether the state rule is procedural or substantive. *Johnson v. Fankell*, 520 U.S. 911, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997). Rather, federal courts must accept a state court's construction of a state statute. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 121 S. Ct. 471, 148 L. Ed. 2d 366 (2000). The rule that federal courts are bound to a highest state court's interpretation and construction of a state statute applies, even though the construction given to the statute by the state court may differ from the construction which the federal court, if it were exercising its own independent judgment, would give

thereto. *Jones v. Prairie Oil & Gas Co.*, 273 U.S. 195, 47 S. Ct. 338, 71 L. Ed. 602 (1927). The rule also applies even though a similar provision of a federal statute has been differently construed by the federal court. *Detroit & M. Ry. Co. v. Fletcher Paper Co.*, 248 U.S. 30, 39 S. Ct. 13, 63 L. Ed. 107 (1918). And the rule applies even though the statute is similar to a statute in another state whose courts construed the statute of their state otherwise. *Doherty v. Tremblay*, 298 U.S. 676, 56 S. Ct. 941, 80 L. Ed. 1398 (1936); *Doherty v. Bartlett*, 83 F.2d 259 (1st Cir. 1936). Indeed, in analyzing a state statute, federal courts are bound by state rules of statutory construction. *In re Reaves*, 285 F.3d 1152 (9th Cir. 2002). For review purposes, the enactment of 28 U.S.C. § 1258 accords to the Supreme Court of Puerto Rico the status of the highest court of a state. *See* also *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 618 (1st Cir. 1956).

In *Leavitt v. Jane L.*, this Court held that even thought it does not normally grant petitions for certiorari solely to review what purports to be an application of state law, the Court has done so, "and undoubtedly should do so where the alternative is allowing blatant *federal-court nullification of state law*." *Id.*, 518 U.S. 137, 144-145,116 S.Ct. 2068 (1996) (per curiam) (citations omitted) (emphasis added). And even if a presumption of deference is given the views of a federal court as to the law of a State within its jurisdiction, in light of the discussed in this petition, such a "deference [is] inappropriate here." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757, 125 S.Ct. 2796 (2005), citing *Leavitt*, at 145. For it is obvious that the court of appeals' state-law ruling is "plainly wrong." *Id.*

III. The Puerto Rico Supreme Court's *intervening* and *conflicting* precedent in *Guzmán v. Vaquería, supra*, compels a GVR order for further consideration pursuant to 28 U.S.C. § 2106.

Under 28 U.S.C. § 2106, this Court may grant the certiorari petition, vacate the lower court's judgment, and remand the case (GVR) for further consideration. Such GVR order is appropriate when the court of appeals' decision is based on a state-law construction that appears to contradict a recent decision of the highest state court. *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 117 S.Ct. 1731 (1997) (per curiam), and other cases therein cited.

The GVR order is also appropriate where this Court have reasons to believe that the court of appeals did "not fully consider" a "recent development." For it reveals a "reasonable probability" that the decision below rests upon a premise that the appellate court would reject if given opportunity for "further consideration," and where it appears that redetermination may determine the ultimate outcome of the litigation. *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 607, 133 L.Ed.2d 545 (1996) (per curiam).

Accordingly, the Puerto Rico Supreme Court's intervening and conflicting precedent in *Guzmán v. Vaquería, supra*, compels a GVR order for further consideration pursuant to 28 U.S.C. § 2106 and this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ

of certiorari should be granted.

Respectfully submitted,

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No. 06-2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RAFAEL DIAZ-RAMOS,
Plaintiff, Appellant,
v.
HYUNDAI MOTOR COMPANY and HYUNDAI AMERICAN TECHNICAL CENTER, INC.
Defendants, Appellees.

August 30, 2007, Decided

COUNSEL: Jorge M. Torrez-Gomez, with whom Vicente Santori-Coll and Torres-Gomez Law Office were on brief, for appellant.

Gene C. Schaerr, with whom Peter K. Dykema, Geoffrey P. Eaton, Brian P. Brosby, Robert Scumaci, Winston & Strawn, LLP, and Gibson, McAskill, & Crosby, LLP were on brief, for appellees.

JUDGES: Before Lipez, Circuit Judge, Selya, Senior Circuit Judge, and DiClerico, * District Judge.

LIPEZ, *Circuit Judge.* The claim that appellant Rafael Diaz-Ramos ("Diaz") brings against Hyundai Motor Company ("HMC") is predicated on the notion that section 259 of the Puerto Rico Antitrust Act, P.R. Laws Ann. tit. 10, § 259 ("Antitrust Act"), in conjunction with the Consumer Class Action Act, P.R. Laws Ann. tit. 32, §§ 3341-3344 ("CCAA"), affords a private right of action to an individual who seeks to represent a class of injured parties. In light of the explicit statutory

language, longstanding precedent regarding class actions, legislative history, and established principles of statutory interpretation, we hold on these facts that no such private right of action exists and affirm the district court's decision to dismiss Diaz's complaint.

I.

The relevant facts are undisputed. In 1998 and 2002, HMC launched recall campaigns for 1995 through 1997 Hyundai Accents to remedy suspension problems that could result from corrosion caused by road salt. The recalls took place in the states within a "salt belt" region designated by the National Highway Traffic Safety Administration.

Diaz owns a 1995 Hyundai Accent and is a citizen and resident of Puerto Rico. His car was not included in the recalls because Puerto Rico is not within the designated region. Believing that the "marine salt environment" of Puerto Rico could induce severe corrosion damage (similar to that caused by road salt) to Hyundai Accents in Puerto Rico, and that his car thus should have been included in the recall, Diaz filed a proposed consumer class action suit in 2005 against HMC and Hyundai American Technical Center, Inc. ("HATCI") pursuant to section 259 of the Antitrust Act; section 3342 of the CCAA; the Puerto Rico Motor Vehicle Act, P.R. Laws Ann. tit. 10, §§ 2060, 2064; and Puerto Rico's general tort statute, P.R. Laws Ann. tit. 31, § 5141.

HMC moved to dismiss Diaz's action for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and HATCI moved to dismiss for lack of in personam jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and for improper venue

pursuant to Federal Rule of Civil Procedure 12(b)(3). The district court granted both motions to dismiss. With respect to HMC's motion, it explained that "[a] cause of action under the Antitrust laws . . . generally requires the plaintiff to show that the defendant engaged in conduct that has a negative impact upon the free flow of trade and commerce and not merely that the defendant may have put a defective product on the market and refuses to correct it," and concluded that Diaz had not alleged that his exclusion from the recalls adversely affected trade and commerce. The court also held that Diaz had not stated a claim under Puerto Rico's Motor Vehicle Act or the general tort statute because he had not alleged that he suffered any actual injury from his exclusion from the recalls. Then, with respect to HATCI, the court concluded that "Diaz cannot show that HATCI has in any way purposely entered the Puerto Rico market," and, consequently, it lacked personal jurisdiction over HATCI.

On appeal, Diaz presses only his claim pursuant to section 259 of the Antitrust Act.[1]

II.

We exercise de novo review over a dismissal pursuant to Rule 12(b)(6), "assuming the truth of all well-pleaded facts . . . and indulging all reasonable inferences in the plaintiff's favor." *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir. 2006). Thus, a complaint should be dismissed for failure to state a claim "only if the facts lend themselves to no viable theories of recovery." *Phoung Luc v. Wyndham Mgmt. Corp.*, F.3d , 496 F.3d 85, 2007 U.S. App. LEXIS 18691, 2007 WL 2253527, at *2 (1st Cir. Aug. 7, 2007).

The district court dismissed Diaz's complaint because he failed "to show that the defendant engaged in conduct that has a negative impact upon the free flow of trade and commerce," as required by section 259(a) of the Antitrust Act.[2] We conclude, however, that a more fundamental problem undermines Diaz's complaint. The Antitrust Act explicitly states that there is no private right of action for a violation of section 259(a), and Diaz's attempt to find such a right of action in the CCAA is unavailing.

Section 268 of the Antitrust Act states that "[a]ny person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, *except §§ 259 and 261 of this title*, may sue therefor[] in the Court of First Instance." P.R. Laws Ann. tit. 10, § 268(a)(emphasis added). This plain language is reinforced by *San Juan Star Co. v. Casiano Commc'ns, Inc.*, 85 F. Supp. 2d 89, 93 & n.3 (D.P.R. 2000), in which the court dismissed with prejudice a private action after reaching the "inescapable conclusion" that the Antitrust Act "do[es] not provide a private right of action" under section 259.

Not so easily rebuffed, Diaz insists that the CCAA provides the private right of action that the Antitrust Act explicitly denies. The relevant provision of the CCAA "recognize[s] the right . . . to consumers of goods and services . . . to file a class suit on behalf of said . . . consumers," including "a class suit . . . based on the Antitrust Act of the Commonwealth, §§ 257-274 of Title 10." P.R. Laws Ann. tit. 32, § 3342. He argues that, because the Antitrust Act and the CCAA deal with the same subject, courts must apply them together, bearing in mind the fundamental objectives of both statutes. The CCAA was enacted to protect consumers against

the "deceitful, improper, false or fraudulent practices" by "the suppliers of goods and services." Act of June 25, 1971, No. 118 (Statement of Motives). This purpose, Diaz explains, favors the interpretation that the CCAA was intended to allow a private right of action for commission of the unfair trade practices described in section 259 of the Antitrust Act.

No authority supports Diaz's claims. First, courts have repeatedly held that the "predicate to [a plaintiff's] right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class." *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970). Both state and federal class action provisions have been construed to confer no substantive rights. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) ("While Comcast is correct when it categorizes the class action . . . as a procedure for redressing claims - and not a substantive or statutory right in and of itself - we cannot ignore the substantive implications of this procedural mechanism."); *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005)("It is axiomatic that Rule 23 cannot 'abridge, enlarge or modify any substantive right' of any party to the litigation." (quoting 28 U.S.C. § 2072)); *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004)("A class action is merely a procedural device; it does not create new substantive rights." (quoting *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002)), *rev'd on other grounds sub nom., Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004)); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 346 (7th Cir. 1997)(stating that "[t]he application of Rule 23 does not abridge, enlarge or modify any substantive right"); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir.

1985)(stating that the federal class-action procedure set forth in Rule 23 "is a rule of procedure and creates no substantive rights or remedies enforceable in federal court"); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (holding that class action is procedural device which does not alter the substantive requirements of the underlying substantive claim); *Winters v. Kan. Hosp. Serv. Ass'n*, 1 Kan. App. 2d 64, 562 P.2d 98, 101 (Kan. App. 1977)(stating that Kansas' class-action statute "is a procedural statute" that "creates no substantive rights").

Thus, the courts that have considered the issue have held that procedural class action provisions neither create substantive rights nor give rise to an independent cause of action. We have found no case contrary to this holding, and we have no basis for concluding that Puerto Rico would deviate from this unanimous authority. We also think that Diaz reads too much into the CCAA's explicit statement that it recognizes a right for consumers to file a class action based on sections 257 through 274 of the Antitrust Act. The specified sections encompass the entirety of the Antitrust Act and offer no indication that the legislature intended to override section 268's more specific statement that section 259 does not support a private right of action. In sum, the right to file a class action cannot exist where -- as with section 259 -- the Antitrust Act does not already afford an individual right.

Moreover, the legislative history of the CCAA offers no indication that its drafters intended to create a right of action for violations of section 259(a). No specific statement implies such an intent. Indeed, the Statement of Motives accompanying the CCAA explains that "[m]any persons acting together as

consumers who have been defrauded may enforce their *individual rights* by means of a consumer class suit." Act of June 25, 1971, No. 118 (Statement of Motives). Not surprisingly, this statement indicates that rights must already exist at an individual level in order to support a class action.

Finally, Diaz's contention that the CCAA effectively serves as an implied repeal of section 268 violates established principles of statutory construction. As the Supreme Court of Puerto Rico has stated: "The courts do not favor implied repeals. A general law does not repeal a special law unless such repeal is expressly stated or clearly arises from the legislative intent." *McCrillis v. Aut. Navieras de P.R.*, 23 P.R. Offic. Trans. 109, 123 P.R. Dec. 113, 1989 Juris P.R. 6 (P.R. 1989)(citation omitted). This authority is aligned with the predominant understanding. The Supreme Court has explained that "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). Moreover, "absent a clearly expressed congressional intention, repeals by implication are not favored. An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003)(plurality opinion)(internal quotation marks and citations omitted); *see also* Morton, 417 U.S. at 550 ("[T]he only permissible justification for a repeal by implication is when the

earlier and later statutes are irreconcilable."). Here, section 268(a) is not irreconcilable with the CCAA; rather, the statutes easily may be harmonized by interpreting the CCAA to leave untouched section 268(a)'s statement that section 259 does not support a private right of action. Similarly, the CCAA neither covers the same subject as section 268(a) nor is clearly intended as a substitute. The CCAA prescribes procedures for consumer class actions, while the latter prescribes substantive standards governing monopolies and restraint of trade. In the absence of any evidence of legislative intent to repeal section 268(a), we find that no such implied repeal took place here.

In the alternative, Diaz asks that we certify the issue of whether a private right of action exists to the Puerto Rico Supreme Court. However, we have held that certification is "inappropriate" if "the course state courts would take is reasonably clear." *Porter v. Nutter*, 913 F.2d 37, 41 n.4 (1st Cir. 1990)(quoting *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 443 n.3 (1st Cir. 1985)). Here, the clarity with which the Puerto Rico legislature has spoken on this issue renders certification unnecessary and inappropriate. And, because our conclusion that no private right of action exists wholly disposes of Diaz's claim, we need not consider HMC's defense that the Antitrust Act is preempted by the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-30169.

III.

We conclude that the district court correctly dismissed Diaz's claims under the Antitrust Act and the CCAA. The Antitrust Act expressly prohibits a private right of action for suits brought under section 259(a),

and nothing in the CCAA -- a procedural class action statute -- provides any indication that the Puerto Rico legislature intended to create a substantive right of action for class action suits pursuant to section 259(a). Thus, the district court was correct in granting HMC's motion to dismiss.

Affirmed.

Footnotes

*Of the District of New Hampshire, sitting by designation.

1On appeal, Diaz does not challenge the district court's conclusion that it lacked personal jurisdiction over HATCI. Thus, as far as we can discern from the record now before us, HATCI remains in the appeal only nominally.

2In pertinent part, section 259(a) of the Antitrust Act states: "Unfair methods of competition, and unfair or deceptive acts or practices in trade or commerce are hereby declared unlawful." P.R. Laws Ann. tit. 10, § 259(a).

CIVIL NO. 05-1193 (JAG)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RAFAEL DIAZ RAMOS, Plaintiff(s) v. HYUNDAI MOTOR COMPANY, et al., Defendant(s)

May 19, 2006, Decided

COUNSEL: For Jorge M. Torres-Gomez, Torres Gomez Law Offices, San Juan, PR, PLAINTIFFS: Vicente Santori-Coll, Vicente Santori Coll Law Office, San Juan, PR

For PHV Brian P. Crosby, Gibson, McAskill & Crosby, Buffalo, NY, DEFENDANTS: Keith A. Graffam, Graffam & Biaggi, San Juan, PR

JUDGES: JAY A. GARCIA-GREGORY, United States District Judge

OPINION AND ORDER

On February 15, 2005, plaintiff Rafael Diaz Ramos ("Diaz") filed this proposed consumer class action suit against defendants Hyundai Motor Company, ("HMC") and Hyundai America Technical Center, Inc. ("HATCI") pursuant to the Puerto Rico Antitrust Act, *P.R. Laws Ann. 10 § 259*, the Puerto Rico Motor Vehicle Act, *P.R. Laws Ann. 10 § 2060 & 2064*, and Puerto Rico's general tort statute Art. 1802, *P.R. Laws Ann. 31 § 5141* (Docket No. 1). On October 7, 2005, HMC moved to dismiss Diaz's claims for failure to state a claims pursuant to *Fed.R.Civ.P. 12(b)(6)*(Docket No. 14). On

the same date, HATCI moved to dismiss Diaz's claims against it for lack of *in personam* jurisdiction and for improper venue pursuant to *Fed.R.Civ.P. 12(b)(2)&(3)*(Docket No. 15). On December 15, 2005, Diaz filed his opposition to HATCI's motion (Docket No. 24), and on December 20, 2005 to HMC's motion (Docket No. 25). For the reasons discussed below, the Court **GRANTS** HMC's and HATCI's motions to dismiss.

FACTUAL BACKGROUND

In 1996, HMC conducted a recall campaign in Puerto Rico for its Hyundai Accent vehicles for model years 1995 through 1997 due to a welding defect with the vehicles' suspension system. In 1998 and in 2003, HMC conducted a partial recall campaign for the same vehicles limited only to the "Salt-Belt States", a group of twenty states where salt is used to de-ice roads during the winter months, due to corrosion problems in the vehicles' suspension system. Diaz now files this suit on behalf of all owners of 1995-1997 Hyundai Accent vehicle owners in Puerto Rico, seeking to challenge HMC's and HATCI's failure to include Puerto Rico in the 1998 and 2003 recalls. Diaz argues that because the environmental conditions in Puerto Rico are also especially conducive to corrosion, the same safety conditions which prompted the recalls in the "Salt-Belt States" could occur here.

DISCUSSION

A. *Motion to Dismiss Standard*

Pursuant to *Fed.R.Civ.P. 12(b)(6)*, a complaint may not be dismissed unless it appears beyond doubt that

plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995).* The Court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in plaintiff's favor. *See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 51 (1st Cir. 1990).* The Court need not credit, however, "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" when evaluating the Complaint's allegations. *Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996).* When opposing a *Rule 12(b)(6)* motion, "a plaintiff cannot expect a trial court to do his homework for him." *McCoy v. Massachusetts Institute of Tech., 950 F.2d 13, 22 (1st Cir. 1991).* Plaintiffs are responsible for putting their best foot forward in an effort to present a legal theory that will support their claim. *Id. at 23* (*citing Correa-Martinez, 903 F.2d at 52*). Plaintiffs must set forth "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable theory." *Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988).*

B. *HMC's Motion to Dismiss*

HMC argues in its motion that plaintiff's claims must be dismissed because (1) plaintiff has not alleged a cognizable injury, (2) plaintiff's claims under Puerto Rico law are preempted by Federal law, and (3) plaintiff cannot support his claims under any of the cited Puerto Rico laws. Because it finds that plaintiff has failed to establish a cause of action under Puerto Rico law, the Court need not enter into a discussion of HMC's preemption and lack of injury arguments and will proceed under the assumption for purposes of this

opinion that Diaz can proceed under state law rather than Federal law.

First, Diaz premises his complaint on *§ 259* of Puerto Rico's Anti-Trust Act, which seeks to prevent any "unfair methods of competition and unfair or deceptive acts or practices in trade or commerce . . . ." *P.R. Laws Ann. 10 § 259(a)*. A cause of action under the Antitrust laws, however, generally requires the plaintiff to show that the defendant engaged in conduct that has a negative impact upon the free flow of trade and commerce and not merely that the defendant may have put a defective product on the market and refuses to correct it. *See, e.g., Pressure Vessels of Puerto Rico v. Empire Gas de Puerto Rico, 137 D.P.R. 497, 509, 1994 Juris P.R. 144 (1994)*("The cardinal purpose of [*P.R. Laws Ann. 10 § 258*] is to protect free competition."); *Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 17 (1st Cir. 2004)*("To create a trialworthy issue in a vertical restraint case brought pursuant to *section 1* of the Sherman Act, a plaintiff must make two showings: concerted action and harm to the competitive process."); *Recetas Por Menos, Inc. v. Five Development Corp., 368 F.Supp.2d 124, 132 (D.P.R. 2005)*("In order to establish an antitrust violation in the instant case Plaintiffs have to show that the alleged arrangement among Defendants has anti-competitive effects . . . ."). Diaz has not established, or even alleged, that HMC's decision to not include Puerto Rico in the 1998 and 2003 recalls somehow adversely affects trade and commerce. His claim is rather premised on the possible injury he might suffer if his vehicle malfunctions, which it has not. Thus, Puerto Rico's Antitrust laws can offer him no relief.

Second, Diaz alleges a cause of action under the Consumers Act, *P.R. Laws Ann. 32 §§ 3341 - 3344*.

These provisions, however, do not contain any substantive law, but rather are part of the Code of Civil Procedure and are limited to authorizing the filing of class actions by consumers for damages or against monopolies. A successful suit would still require that the plaintiff establish a viable cause of action under the appropriate statutes which, as discussed above, Diaz has failed to do.

Third, Diaz alleges a cause of action under the Motor Vehicle Act, *P.R. Laws Ann. 10 §§ 2060 & 2064*. These statutes establish that vehicle manufacturers shall be liable for any damages caused by certain defects in the vehicles (*§ 2060*) and that a manufacturer who violates any of the act's provisions could be subject to the provisions of the Antitrust Act (*§ 2064*). As it pertains to *§ 2060*, Diaz has not established that he has suffered any injury caused by a defect in his vehicle. Furthermore, while *§ 2064* authorizes the filing of complaints against manufacturers under the Antitrust laws for failure to comply with the Act's provisions, it still requires a viable Antitrust cause of action which, as discussed above, Diaz cannot establish.

Finally, Diaz alleges a cause of action under Art. 1802, *P.R. Laws Ann. § 5141*, Puerto Rico's general tort statute. A cause of action for tort damages, however, presupposes that the plaintiff has suffered an actual injury caused by defendant's fault or negligence. *See, e.g., Admor. F.S.E. v. Almacen Ramon Rosa, 151 D.P.R. 711, 725, 2000 Juris P.R. 122 (2000)*(To establish a cause of action for damages, plaintiff must show by preponderance of the evidence the reality of the injury suffered, the existence of a negligent act or omission, and the element of causality). In this case, Diaz has not alleged that he has suffered any injury other than his subjective fear that his vehicle could malfunction due to

corrosion and cause an accident. Art. 1802 does not provide for the compensation of potential future injuries, only injuries actually suffered.

Therefore, Diaz has failed to establish a viable cause of action under any of the cited laws and his complaint against HMC must be dismissed.

C. *HATCI's Motion to Dismiss*

In diversity cases, *in personam* jurisdiction over a non-resident defendant is determined according to the long-arm statute of the forum in which the federal district court sits. *Pizarro v. Hoteles Concorde Int'l, 907 F.2d 1256, 1258 (1st Cir. 1990).* The exercise of specific *in personam* jurisdiction pursuant to the state long-arm statute must fall within constitutional bounds. *See Pritzker v. Yari, 42 F.3d 53, 60 (1st Cir. 1994); Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 207 n. 9 (1st Cir. 1994).* Accordingly, there are two requirements for the proper exercise of specific in personam jurisdiction: (1) that the forum state have a long-arm statute that grants jurisdiction over defendant and (2) that the exercise of jurisdiction under that state statute does not exceed constitutional limits. *Pritzker, 42 F.3d at 60.*

Puerto Rico's long-arm statute is contained in Rule 4.7 of the Puerto Rico Rules of Civil Procedure. Rule 4.7 provides in part:

> (a) Whenever the person to be served is not domiciled in Puerto Rico, the General Court of Justice shall take jurisdiction over said person if the action or claim arises because said person:
>
> > (1) Transacted business in Puerto Rico personally or through an agent; or
> >
> > (2) participated in tortious acts within Puerto Rico personally or through his agent;

> (3) was involved in an automobile accident while driving a motor vehicle in Puerto Rico personally or through his agent; or
> (4) was involved in an accident in Puerto Rico while operating, personally or through his agent, a freight or passenger transportation business in Puerto Rico, between Puerto Rico and the United States or between Puerto Rico and a foreign country, or if, in the operation of said business, an accident occurs outside Puerto Rico and the contract had been executed in Puerto Rico; or
> (5) owns, uses or possesses, personally or through his agent, real property in Puerto Rico.

P.R. Laws Ann. 32, App. III, Rule 4.7(a). It has been interpreted to extend personal jurisdiction to "the full extent of constitutional authority." *Pritzker, 42 F.3d at 60; see also Dalmau Rodriguez v. Hughes Aircraft Co., 781 F.2d 9, 12 (1st Cir. 1996)(citing A.H.Thomas Co. v. Superior Court, 98 P.R.R. 864, 870 n. 5, 98 P.R. Dec. 883 (1970))*. The exercise of *in personam* jurisdiction by courts in Puerto Rico is therefore "limited only by the due process analysis of *International Shoe [v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)]* and succeeding cases." *Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 668 (1st Cir. 1980)*. Accordingly, this Court need only determine whether the exercise of jurisdiction over the defendants in the instant case falls within constitutional bounds.

Due process requires that minimum contacts exist between the non-resident defendant and the forum, in

this case Puerto Rico, where the claim was filed. *See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)*; *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*. The minimum contacts must be such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe, 326 U.S. at 316*. In other words, Due Process "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Volkswagen, 444 U.S. at 297*.

The First Circuit has developed a three-pronged analysis to sharpen the inquiry into minimum contacts. According to this test, a court may exercise specific personal jurisdiction if the following requirements are met:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

Pritzker, 42 F.3d at 60-61.

In this case, Diaz argues that HATCI complies with the requirements of Puerto Rico's long-arm statute because (1) its act of omitting Puerto Rico from the

1998 and 2003 recalls is an act or transaction consummated within this forum because it affected nearly 32,000 class vehicles; (2) its omission gave rise to the cause of action because plaintiff and the class he purports to represent are exposed to substantial and life-threatening injury; and (3) that its omission is substantial enough so as not to offend the due process requirements of fair play and substantial justice. Diaz's claims against HATCI, however, must be dismissed because the Court finds that HATCI has neither conducted a business transaction in Puerto Rico nor committed a tortious act within Puerto Rico.

First, as discussed above, Diaz has suffered no injury. Thus, if Diaz cannot establish that he suffered an injury, it clearly follows that HATCI did not commit a tortious act against him within Puerto Rico.

And second, Diaz has failed to establish that HATCI transacted any business within Puerto Rico. "For such 'minimum contacts' to be sufficient for the exertion of personal jurisdiction, they must be the result of a purposeful act by defendant." *Santini Rivera v. Santon, 118 F.Supp.2d 159, 163 (D.P.R. 2000).* "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)(citing International Shoe, 326 U.S. at 319).*

HATCI is a subsidiary of HMC which purpose seems to be the design" and development of HMC's vehicles and that takes no part in the actual selling of the vehicles. Actually, it seems HATCI does not conduct any business with entities other than its parent company. [1] It is HMC, through its dealers, who actually

transacts any business in Puerto Rico by importing and selling its vehicles here. So while there's no question that HMC does transact business in Puerto Rico, Diaz cannot show that HATCI has in any way purposely entered the Puerto Rico market. Thus, no basis exists for the Court to exercise its jurisdiction over HATCI and Diaz's claims against it must be dismissed. [2]

1 *See* http://www.hatci.com.

2 It bears noting that even if the Court had *in personam* jurisdiction over HATCI, it would still be inclined to dismiss Diaz's claims because, as discussed above, he has failed to establish a cause of action under any of the above-cited laws.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** HMC's and HATCI's motions to dismiss. Diaz's claims are hereby dismissed. Judgment shall enter accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 19th day of May 2006.

s/ JAY A. GARCIA GREGORY

United States District Judge

No. 06-2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RAFAEL DIAZ-RAMOS,
Plaintiff, Appellant,

v.

HYUNDAI MOTOR COMPANY and HYUNDAI AMERICAN TECHNICAL CENTER, INC.
Defendants, Appellees.

Entered: September 24, 2007

Before: Boudin, Chief Judge, Torruella, Circuit Judge, Selya, Senior Circuit Judge, Lynch, Lipez, Howard, Circuit Judges, and DiClerico*, District Judge.

ORDER OF COURT

The petition for rehearing having been dienied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges ofthis court and a majority of the judges not having voted tha the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

Footnote

*Of the District of New Hampshire, sitting by designation.

Guzmán et al. v. Tres Monjitas Inc. Dairy Farm, et al.
Puerto Rico Supreme Court Opinion of December 14, 2006

2006 TSPR 187, 169 DPR ___ (Fiol Matta)
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II

Through their allegations the petitioners propose that the class action for consumers of goods and services recognized by the Law 118 is different than the general class action of Rule 20. The present lawsuit requires, therefore, to define the relationship between both provisions, in order to determine if, in effect, the present cause of action can be certified as a class action. The underlying controversy is to determine the standard to be followed by the courts in certifying a class action suit when the same is filed by consumers of goods and services.

III
***

As is common knowledge, in Puerto Rico we have been progressively adopting the American civil procedure system.[3] Along that course, new Rules of the Code of Civil Procedure were enacted in 1943, these were basically a translation of the Federal Rules of Civil Procedure. Rafael Hernández Colón, Manual of Civil Procedure Law 4-12 (1981). At that time we introduced the figure of class action as drafted on Rule 23 of the Federal Civil Procedure, in its 1938 version.
***

From the above stems the fact that class actions in Puerto Rico suffered the same ill fate of class actions

in the United States before the Federal Rules of Procedure were amended in 1966. As pointed out before, in the United States this interpretation had caused serious problems for filing group claims which did not represent joint or several rights, flaws that were corrected in the Federal Rules by the amendment of 1966.

Within this context and in response to the need of making class actions a useful mechanism for consumers, our Legislature passed the Law No. 118 of June 25, 1971, 32 LPRA 334, creating the class action of the consumer of goods and services. Evidently, when this law was passed an exception to Rule 20.1 was established, providing that a technically "spurious" class could obtain a judgment whose effects would be extended to all class members even if they were not present in court. Specifically, the Law 118 recognized the right of the consumers of goods and services and of the Commonwealth of Puerto Rico, as *parens patriae*, to "file a class suit on behalf of said consumers by reason of damages."

This new legislation incorporated, in an abbreviated manner, several dispositions of the Federal Rule 23. In first place, it requires that the court determine, as soon as possible, if the action may continue as a class action, when there is a common question of fact and law among the allegedly affected consumers. This requirement is similar to the one that has been named "commonality".[5] Likewise, the Law 118 requires that the class action be deemed superior to other available resources for the fair adjudication of the controversy. Lastly, the Law 118 adopts the norms of Federal Rule 23 regarding notice to class members.

The objective of overcoming the flaws of the Rule 20 by then in effect is clearly exposed in the

extremely inclusive language used by the legislator when defining the class as a group of people who have among them a "common question of fact or law". 32 LPRA §3344. This intent arises also from the Joint Report of the Senate on S.B. 825 of April 15, 1971, which expressly points out that "the purpose of this measure is to *make an addition* to Rule 20 of the Civil Procedure in order to allow consumers of goods and services to file a class action suit" (emphasis ours).

The statement of motives of the Law 118 highlight the legislator's concern regarding the limitation of the legal tools available to Puerto Rican consumers, pointing out that:

> Unfortunately the remedies available to consumers to enforce their rights are still inadequate and the protection offered the consumer by the Consumers Service Administration...[6] is not sufficient... For this reason, a suit filed directly by the consumer is warranted in such cases. [OFFICIAL TRANSLATION]

In addition, the Law 118 recognized the inherent difficulty of claiming small sums against the big businesses. As so is recorded also in its statement of motives by stating that:

> Usually claims of the consumers involve such small amounts of money that they do not justify an individual suit; it is more economical and fair that claims essentially identical be filed in a single class suit on behalf of all consumers who have been cheated and deceived... This type of action compensates the inability of the individual

> consumer to litigate small individual losses by permitting that one or more representatives of a group of consumers with similar damages may bring a suit on behalf of a class...The latter are forced to consider not only the direct economic loss of the class suit but also the publicity and public reaction with the entailing loss of time, name or prestige. In the interest of discouraging the improper and deceitful conduct of the suppliers of goods and services to consumers, the Legislature of Puerto Rico considers it of imperative necessity to establish the consumer class suit. [OFFICIAL TRANSLATION]

This means that the Law 118 intended, on the one hand, to extend the scope of Rule 20 overcoming the limitations imposed on the so called spurious class, and on the other, to authorize the consumers to go directly to Court to vindicate their rights without having to be assisted by a governmental agency. In this sense, its objective is to eliminate all legal obstacles that might make it difficult for the consumers to go to Court.

In summary, the class action established by the Consumer of Goods and Services Class Action Act had the purpose of *overcoming* the limitations of the old Rule 20 of civil procedure, allowing consumers as well as the State to go to Court and safeguard the rights of consumers. It constitutes, according to its statement of motives "an addition" to the general provisions of Rule 20. Therefore it did not create a class action necessarily different but, in recognizing the public interest to protect the consumers of goods and services, it extended the scope of the class action to them. This, in addition to the fact that the Law 118 does not establish

specific criteria to define what constitutes a class, means that at the time of certifying a class the courts must examine if they comply, not only with the general definition of the Law 118, but also with the specific requirements of Rule 20.

We must highlight that the Rule 20 now in force is the 1979 amended version, after the promulgation of the Law 118. That year the Rule 20 was revised entirely to make it similar to the Federal Civil Procedure Rule 23 adopted in 1966 and allow, therefore, filing typically spurious class actions. Obviously, the intent was to stretch the definition as well as the scope of class actions so that they would be more accessible to other groups that, just as consumers of goods and services, would not have any other means and, as a practical matter, an opportunity to claim their rights in court. [7]

It is necessary to recognize that when amending Rule 20 the Law 118 lost part of its initial relevance. Nonetheless, this does not mean that it is dead letter. When the new Rule 20 was passed our Legislature did not abolish the Consumer Class Action Act. It survived as a specific tool that grants the consumers a broad and effective instrument to protect their rights. Even if it is a class action essentially similar to Rule 20, the Consumer Class Action Act allows the concession of additional remedies, among them the injunction and it recognizes the right to the consumers to file an action under the Antitrust Act of the Commonwealth of Puerto Rico, 10 LPRA § 257 et. seq.

As pointed out earlier, the Law 118 authorizes to the consumers of goods and services to go to court to vindicate their rights, allowing them to avoid the obstacles that are occasionally presented by the bureaucracy of the agencies that are called upon to

defend them. Law 118 constitutes, therefore, a mandate for the courts to open our doors to the consumers injured by the unlawful practices of the providers of goods and services.

This mandate was reiterated as recently as 2002 when the Law No. 269, which was passed on November 16 of that same year, amended the Law 118 to clarify the primary jurisdiction of the Court of First Instance in this type of litigation. There the legislator stressed in the statement of motives that:

> The protection of consumers of goods and services is imbued by the greatest public interest... Through this Act, this Legislature solidifies the cause of action provided by Act No. 118 by clarifying that the Court of First Instance has exclusive primary jurisdiction, this being a special cause of action. [OFFICIAL TRANSLATION]

In summary, in evaluating the discretion of the Court of First Instance when certifying a class, we cannot leave behind our Legislature's mandate to pave the way to court for consumers.

Of the above it is necessary to underscore the following points. In first place, the Law 118 did not create a different class action form from the one established by Rule 20, but it extended the remedies available for the consumers of goods and services. In terms of the requirements applicable to certify a class of consumers of goods and services we should emphasize the requirements of "predominance and superiority", and "commonality" which, although present in Rule 20, are the only ones expressly provided for in the Law 118. This means that when

filing class actions under this Law, we should focus first on these two requirements to determine if an alleged class deserves the remedies established therein. Once the requirements of "predominance and superiority", and "commonality" are satisfied it is necessary to examine if the other supplemental requirements of Rule 20 are met, in other words, numerosity, typicality and adequate representation. Nevertheless, when applying these requirements we must interpret them within the spirit of liberality and inclusion that inspired the Law 118.

III

To clarify the abovementioned let us examine the particular facts of this case interpreting the criteria of "predominance and superiority" provided by the Law 118 and the other criteria of the Rule 20 of Civil Procedure, with the liberality required by the Law 118. There is no doubt that it is within a broad framework of discretion of the Court of First Instance to determine if a lawsuit qualifies as a class action. This commonly means that the reviewing courts should not intervene in that decision, unless it is proved that the instance forum has abused its discretion. Meléndez Vega v. Caribbean Intl. News, 151 D.P.R. 649, 664 (2000); Lluch v. Espa a Service Sta., 117 D.P.R. 729, 745 (1986); Valencia, Ex parte, 116 D.P.R. 909, 913 (1986); Ortiz Rivera v .Agostini, 92 D.P.R. 187, 193 (1965). José Cuevas Segarra, Law Treaty for Civil Procedure, 396. Nevertheless, as we pointed out earlier, in the particular case of the class action of the consumers of goods and services, said discretion is *limited* by the public interest in favor of the consumers as stated by the Law 118. Not acting in this way would attempt against a clear and reiterated legislative intention.

***

CERTIFICATE OF TRANSLATOR

I, Brenda Bibiloni, US Certified Translator/Interpreter, certify that the following tanslations are a true and exact translation of the documents provided to me: *** (3) Guzman et al. v. Tres Monjitas Inc. Dairy Farm, et al.

I also certify that in no form or manner am I related to the parties nor am I interested in the results of this matter. I certify today, January 19, 2007.

Footnotes

[3]Before the American invasion in 1898, in Puerto Rico applied the Code of Civil Procedure of 1886 which remained in force until August 16, 1899, when the Military Government issued the Order #118 which reorganized the judiciary branch and provided norms regarding judicial, civil and criminal procedures. This Order established certain procedural rules and recognized the force and effect of many others of the prior Code of Civil Procedure that remained partially in effect. On March 10, 1904 the Code of Civil Procedure of 1904 was approved, it was prepared by the so-called "Commission of Codes", in charge of harmonizing our legal system with the new political regime. Rafael Hernández Colón, Manual of Civil Procedure Law 4-12 (1981).

[5]This is the same requirement of Rule 20.1 (2) of the Puerto Rico Civil Procedure.

[6]Predecessor of the Department of Consumer Affairs.

[7][Footnote omitted (about real, hybrid and spurious classes)]

P.R. Laws Ann. Title 32, §§ 3341-3344 — Class Suit for Consumers of Goods and Services.

§ 3341. Suit for damages.

There is recognized the right to consumers of goods and services and/or to the Commonwealth of Puerto Rico, through their agencies, dependencies and instrumentalities in their capacity of "parens patriae" to file a class suit on behalf of said consumers by reason of damages as well as injunction suits under Rule 57 of the Rules of Civil Procedure of 1958, for the General Court of Justice, as amended.
(June 25, 1971, No. 118, p. 362, § 1).

§ 3342. Suit against monopolies.

There is recognized the right to merchants, to consumers of goods and services and to the Commonwealth of Puerto Rico to file a class suit on behalf of said merchants or consumers based on the Antitrust Act of the Commonwealth, §§ 257- 274 of Title 10.
(June 25, 1971, No. 118, p. 362, § 2).

§ 3343. Jurisdiction of Court of First Instance.

The Court of First Instance shall have exclusive primary jurisdiction on class suits filed pursuant to this chapter. Therefore, the court is hereby vested with authority to prevent, avoid, deter and punish any action to the prejudice of the consumers and/or independent merchants [irrespective] of the amount involved, and during the proceeding before final judgment is rendered, the court may enter such restrictive and

prohibitive orders as it may deem fair and equitable pursuant to the act giving rise to the action.

In its order or judgment, the Court of First Instance shall impose an amount equal to the damages determined as compensation for damages, plus a reasonable amount not less than twenty-five percent (25%) for attorney's fees, plus legal interest from the moment the damage is caused and costs of the proceedings. Any judicial action or suit filed individually may be settled through the intervention of the Consumers Service Administration, which shall have thirty (30) days after receiving notice of the settlement by the court to state its position on the matter.
(June 25, 1971, No. 118, p. 362, § 3; Nov. 16, 2002, No. 269, § 1).

P.R. Laws Ann. Title 10, §§ 257-276 — Monopolies and Restraint of Trade.
§ 259. Fair competition.

(a) Unfair methods of competition, and unfair or deceptive acts or practices in trade or commerce are hereby declared unlawful.
(June 25, 1964, No. 77, p. 235, § 3; May 30, 1970, No. 67, p. 78; June 23, 1978, No. 72, p. 242, eff. June 23, 1978).

§ 268. Actions by persons suffering damages.

(a) Any person who shall be injured in his business or property by any other person, by reason of acts or intended acts, forbidden or declared to be unlawful by the provisions of this chapter, except §§ 259 and 261 of this title, may sue therefor in the Court of First

Instance and shall recover threefold the damages by him sustained, plus costs, including a reasonable amount for attorney's fees.
(June 25, 1964, No. 77, p. 235, § 12).

P.R. Laws Ann. Title 23, §§ 1001-1017 — Consumers Service Administration.

§ 1005. Powers.

(g) To resolve and adjudge the complaints presented by the consumers of goods and services acquired or received from the private sector of the economy entailing any unfair or deceitful act or practice including, but without it being limited, to the unfulfillment of an offer, warranty or service, or the publication of false or deceitful advertisements.
(June 27, 1968, No. 148, p. 438, § 5; June 30, 1972, No. 31, p. 445).

§ 1016. Costs and attorney's fees.

(a) The Department of Consumer Affairs and the Department of Justice may recover costs and attorney fees in all actions that are filed in our courts and in the federal courts for the protection of consumers.

(b) The costs and attorney's fees recovered under subsection (a) of this section shall be covered into the Treasury of Puerto Rico, in a Special Fund to be administered by the Secretary of the Treasury of Puerto Rico, but which shall be devoted to defray, in part, the expenses incurred by these agencies in initiating future actions for the protection of the consumers.

(Mar. 20, 1972, No. 10, p. 23, §§ 1, 2; Sept. 17, 2004, No. 379, § 2).

§ 1017. Amounts recovered in judgments; special fund.

The amounts recovered by the plaintiffs on behalf of consumers and/or merchants unnamed or undetermined in class suits under the laws of the Commonwealth and/or the United States of America shall be deposited in a Trust Fund to be used according to an order issued by the sentencing court, which shall see that said amounts be used in favor or in benefit of the consumers' or merchants' class who suffered the damage.

The court shall appoint an administrator for such Fund and shall fix his fees. If the administrator happens to be a government official, he shall receive no compensation whatsoever.

During the year following the filing of copy of the judgment, any member of the class favored by the latter may claim his rights pursuant to the proceedings established by the court.

After one year, the amounts recovered shall be deposited in a Trust Fund created by § 1016(b) of this title and shall be used for the prosecution of actions for protection of the consumers and/or merchants.

The court shall order the administrator to notify the members of the class through the publication of edicts in two (2) newspapers of general circulation and in a fairly visible way, once (1) a week, during the four (4) weeks immediately following the judgment and the four (4) weeks immediately preceding the end of the one (1) year prescribed period settled in this section. The court may provide, in addition to the method herein indicated, any other it deems proper.
(June 7, 1973, No. 110, p. 455).